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No. 04-1324

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK A. DAY
Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals of the Eleventh Circuit

BRIEF OF TEXAS, 30 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Can a State waive a limitations defense to a habeas corpus petition by either failure to plead or by express, although mistaken, concession?

2. Does a federal district court have power to *sua sponte* dismiss a habeas petition on an affirmative defense not invoked by the State in its answer?

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INTERESTS OF THE AMICI

Amici States have a substantial interest in ensuring the finality of their convictions and reducing the burden on their resources from meritless and even frivolous habeas petitions. Although Amici States strive to invoke their affirmative defenses in a timely manner, mistakes can and do happen. On these occasions, Amici States believe that a federal district court should have the power and discretion to decide whether to dismiss a habeas petition on a ground not raised by the State. The outcome of this case will affect the course of habeas petitions throughout the country and will affect the efficacy of the one-year statute of limitations on filing federal habeas petitions.

SUMMARY OF THE ARGUMENT

The federal courts have inherent equitable powers, which include the power to dismiss cases *sua sponte*. Although federal courts generally do not dismiss cases based on waived affirmative defenses, this Court has approved a different approach in habeas cases. In *Granberry v. Greer*, 481 U.S. 129 (1987), this Court held that a federal court may dismiss a habeas petition *sua sponte* on grounds of non-exhaustion even where the State had failed to raise that affirmative defense in the district court. Although the Court has not yet addressed whether this holding extends to the statute-of-limitations defense, there is no reason to distinguish the two affirmative defenses. The important societal interests furthered by the non-exhaustion defense—comity and federalism—are also furthered by the limitations period set forth in 28 U.S.C. § 2244(d).

No rule or statute deprives federal courts of their equitable power to invoke the limitations period *sua sponte*. Petitioner relies on negative inferences he draws from several rules, but none of the inferences is well grounded. Federal Rule of Civil Procedure 12(h)(3), which embodies the well-established rule that a federal

court may dismiss an action for lack of subject matter jurisdiction, does not remotely suggest that the courts' authority to dismiss actions *sua sponte* on other grounds has been revoked. And Rule 4 of the Rules Governing Section 2254 Cases merely establishes a screening procedure under which district courts must immediately dismiss facially meritless petitions. It says nothing, and implies nothing, about courts' power after the State is ordered to respond to a petition. Finally, Petitioner points to rules supporting the proposition that affirmative defenses that are not timely raised are waived. Even if that is true with respect to the habeas limitations period, that would mean only that the State can no longer move the court to dismiss based on that defense. That would not answer the distinct question whether a court has the power to dismiss a habeas petition *sua sponte* based on a waived defense, a question not answered by the rules.

The unique nature of habeas cases supports *Granberry*'s conclusion that federal courts have the discretion to dismiss petitions *sua sponte* based on affirmative defenses not raised by the State. Most notably, habeas cases differ from most civil actions in that they involve interests beyond those of the parties. Like criminal proceedings, habeas actions concern society's interest in order and safety. Habeas actions also affect the interests of comity, federalism, and finality, and (due to their great number) the courts' interest in judicial administration. The varied and important societal interests at stake in habeas cases militate in favor of district courts retaining the authority to dismiss petitions *sua sponte*; the States' error in failing to raise a defense in a timely fashion should not automatically bar a disposition that would further those interests.

The ways by which habeas practice differs from ordinary civil litigation also support district courts having the *sua sponte* power to dismiss petitions. First, the parties rarely engage in discovery in

habeas cases and habeas courts rarely hold evidentiary hearings. Habeas cases are therefore typically decided on the papers. As a consequence, the purported costs of *sua sponte* dismissals based on waived defenses—the time and resources expended litigating a case that should have been dismissed earlier—are far less in habeas cases. Second, several rules and practices in habeas cases are designed to ameliorate the strain placed on States of handling thousands of petitions, many of which are long and incomprehensible. Allowing habeas courts to dismiss petitions *sua sponte* is consistent with the objective of those rules and practices.

Finally, Petitioner has not presented any evidence to suggest that lower courts have misused their long-recognized power to dismiss habeas actions *sua sponte* based on the defenses of non-exhaustion and procedural default. There is no reason to believe that the courts will not sensibly exercise their discretion, after taking into account the competing interests at stake, to dismiss actions *sua sponte* based on the statute of limitations.

ARGUMENT

There is no dispute that the statute of limitations set forth in 28 U.S.C. § 2244(b) is an affirmative defense and not a jurisdictional prerequisite to a habeas action. The dispute centers instead on two other issues. The first is whether the State's failure to assert the limitations defense in a timely manner amounts to a waiver. We will leave that issue to the parties, who are best positioned to address whether a waiver occurred in this case. This brief will focus on the second issue, which is whether a federal district court possesses the equitable power to dismiss a habeas petition *sua sponte* based on untimeliness after the State has filed its response. A careful review of district courts' equitable powers, the Federal Rules of Civil Procedure (hereafter "Civil Rules"), the Rules Governing Section 2254 Cases (hereafter "Habeas Rules"), and the

nature of habeas practice leads to only one conclusion: district courts have that power.

I. Federal District Courts Have the Equitable Power to Dismiss Habeas Actions Based on Affirmative Defenses Not Raised by the State.

This Court has long recognized that the power to act *sua sponte* is "inherent in every court of justice." *Arkadelphia Co. v. St. Louis Sw. Ry. Co.*, 249 U.S. 134, 146 (1919). This power exists, in large measure, because a "judge, at least in federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene *sua sponte* to that end, when necessary." *Brown v. Walter*, 62 F.2d 798, 799 (CA2 1933) (Hand, L., J.). The range of actions district courts may take *sua sponte* is broad. Examples include entering summary judgment in a civil action, *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), dismissing a case under the doctrine of *forum non conveniens*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 502 (1947), dismissing a case for lack of prosecution, *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962), and dismissing an appeal in a criminal case when the defendant is a fugitive, *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970).

These decisions make clear that it is perfectly appropriate for a judge to dismiss a case on his or her own motion when the balance of interests militates in favor of that result. To be sure, the general practice has been for federal courts not to dismiss ordinary civil cases based on affirmative defenses that had not been raised by a party. *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004). But, consistent with the equitable—and therefore flexible—nature of federal courts' inherent powers, courts have exercised the power to dismiss civil actions *sua sponte* based on unraised affirmative

defenses in the habeas context. The leading case is *Granberry v. Greer*, 481 U.S. 129 (1987).

In *Granberry*, this Court addressed "[h]ow an appellate court ought to handle a nonexhausted habeas petition when the State has not raised this objection in the district court." *Id.* at 131. The Court unanimously held that "the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. Quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886), the Court stated that "[t]he injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it." *Granberry*, 481 U.S. at 133. Accordingly, held the Court, lower courts should evaluate on a case-by-case basis "whether the interests of comity and federalism will be better served by addressing the merits forthwith" or addressing the exhaustion defense. *Id.* at 134. The issue is one of discretion: cases in which the affirmative defense is "not asserted in the district court may present a wide variety of circumstances which the courts . . . drawing on their familiarity with state criminal practice, are able to evaluate individually." *Id.* at 136.

The lower courts have unanimously read *Granberry* to allow federal courts—both district and appellate—to dismiss habeas petitions on procedural default grounds, even when the government failed to raise that affirmative defense.[1] There is no reason to treat

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[1] *See, e.g., Yeatts v. Angelone*, 166 F.3d 255, 261-62 (CA4 1999); *Lorraine v. Coyle*, 291 F.3d 416, 425-26 (CA6 2002); *King v. Kenna*, 266 F.3d 816, 822 (CA8 2001) (en banc); *Windham v. Merkle*, 163 F.3d 1092, 1100 (CA9 1998); *Magouirk v. Phillips*, 144 F.3d 348, 357-58 (CA5 1998); *Brewer v. Marshall*, 119 F.3d 993, 999 (CA1 1997); *Esslinger v. Davis*, 44 F.3d 1515, 1524-25 (CA11 1995); *Washington v. James*, 996 F.2d 1442, 1448 (CA2 1993); *Hardiman v. Reynolds*, 971 F.2d 500, 501-05 (CA10 1992); *Hull v. Freeman*,

the affirmative defense of the statute of limitations any differently from the defenses of non-exhaustion and procedural default. All three defenses serve important and interrelated federal interests.

The one-year limitations period imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter "AEDPA") "quite plainly serves the well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). It does so by "reduc[ing] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Id.* And, contrary to Petitioner's suggestion (Br. 41), this interest in finality has significant comity and federalism implications. The judgment for which finality is sought is a *state* court judgment; and its finality is being stalled by a *federal* proceeding. Speeding up the federal proceeding reduces the friction between the federal and state systems and limits the disruption caused by the federal habeas process. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982) (noting that the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible").

The doctrines of procedural default and non-exhaustion are therefore bound together with the interest in finality, a fact recognized by this Court when it stated, "[w]e now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In enacting AEDPA—of which the new statute of limitations was a key component—Congress sought to address

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932 F.2d 159, 164 n.4 (CA3 1991), overruled on other grounds by *Caswell v. Ryan*, 953 F.2d 853 (CA3 1992); *Burgin v. Broglin*, 900 F.2d 990, 997-98 (CA7 1990).

these interrelated concerns. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("AEDPA's purpose [is] to further the principles of comity, finality, and federalism."). Petitioner's effort to disentangle the doctrines and suggest that the interest in finality is of a different and less important nature is misguided. The interests that justify the *Granberry* rule fully justify its application to the statute of limitations defense.

II. Neither the Federal Rules of Civil Procedure Nor the Habeas Rules Circumscribe Federal Courts' *Sua Sponte* Powers.

If a Civil or Habeas Rule expressly stated that federal courts lack the power to dismiss habeas actions based on an affirmative defense the State failed to raise, that would be the end of the matter absent a contrary statutory directive. But neither set of rules contains such a provision. Courts' equitable authority to dismiss habeas actions *sua sponte* therefore remains in full force.

Petitioner, notwithstanding his lengthy detour into the Civil and Habeas Rules, does not argue that any rule *expressly* precludes a habeas court from dismissing an action *sua sponte* based on an affirmative defense that the government failed to raise. He relies instead on a series of negative implications that purportedly can be drawn from the rules and on the equation of habeas actions with ordinary civil actions. Pet. Br. 9–15. This argument fails for a number of reasons.

1. As initial matter, all of Petitioner's rule-based arguments founder in light of *Granberry*. None of the Civil and Habeas Rules upon which Petitioner relies was amended in any relevant way between *Granberry* and the date this case left the district court. Yet, as noted, *Granberry* held that a federal court of appeals may

dismiss a habeas action based on an unraised affirmative defense—namely, exhaustion. Petitioner's reading of the Civil and Habeas Rules can be reconciled with *Granberry* only if one distinguishes the *sua sponte* power of courts of appeals from the *sua sponte* power of district courts. None of the lower courts has made that distinction, however, *see infra* at 5-6 n.1, and for good reason.

Whatever policy reasons might have militated against allowing *sua sponte* dismissals in habeas cases apply equally or more so to *sua sponte* dismissals by federal courts of appeal. After all, such dismissals by their nature come far later in the process than dismissals by district courts, thereby increasing the resources expended before dismissal. Nonetheless, in *Granberry*, the Court unanimously rejected the "extreme position[]" that a court of appeals cannot reject a habeas petition based on an affirmative defense not raised by the State. 481 U.S. at 133. It would be absurd for the courts of appeals to have the power to reject *sua sponte* a habeas petition based on a defendant's failure to exhaust—or based on his procedural default or his failure to comply with the statute of limitations—but for the district courts not to have the power.

2. The principal Civil Rule upon which Petitioner relies is Rule 12(h)(3), which provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." According to Petitioner, the words "or otherwise," which allow a court to dismiss for lack of subject matter jurisdiction even when the parties have not "suggest[ed]" that course, creates the negative implication that district courts lack authority to dismiss *sua sponte* for other reasons. Pet. Br. 13. This reads far too much into the provision. Civil Rule 12(h)(3) simply embodies the non-controversial, well-established rule that subject matter

jurisdiction cannot be waived by the parties. *See, e.g., Jackson v. Ashton*, 33 U.S. 148, 149 (1834). It does not purport to speak to district courts' *sua sponte* power generally and does not purport to withdraw inherent, equitable powers possessed by the courts with respect to other matters.

Moreover, Petitioner's argument proves too much. If Petitioner were correct, this would mean that district courts lack the authority to rule *sua sponte* with respect to *any* matter covered by the Civil Rules apart from subject matter jurisdiction. After all, "[t]he drafters of the Civil Rules thus knew how to authorize *sua sponte*" powers and "chose not to do so with respect to those" other matters. Pet. Br. 13. Yet notwithstanding Rule 12(h)(3), this Court has continued to find that courts have the equitable power to dismiss actions on their own motion. For example, in *Celotex Corp.*, 477 U.S. at 326, the Court observed that "district courts are widely acknowledged to have the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all her evidence." This is so even though Civil Rule 56 authorizes parties to file motions for summary judgment, but does not speak to a court's power to grant summary judgment *sua sponte*.

3. Petitioner also points to Civil Rules 8(c) and 12(b) for the proposition that an affirmative defense that is not raised in the appropriate pleading is waived. Pet. Br. 10-11. That may well be true, but it does not answer the core question before this Court. A waiver is *not* the equivalent of a lack of *sua sponte* power. That a State may have waived an affirmative defense does not answer the question whether a court may *sua sponte* dismiss based on that defense; it raises the question.

A party who waives a claim or defense forfeits the right to raise the claim or defense at a later time and require the court to rule on it. *Eberhart v. United States*, 126 S. Ct. 403, 404-05 (2005) (citing *Kontrick*, 540 U.S. at 458-60). That is a significant consequence and a significant incentive not to waive claims. Forbidding judges from ruling on issues *sua sponte* is a very different consequence and one that does not necessarily follow from waiver. Even if Civil Rules 8(c) and 12(b) fully applied to defenses in habeas actions, they would not determine judges' power to act *sua sponte* on waived claims in habeas actions. No Civil Rule speaks to that particular consequence.

4. Petitioner asserts that Habeas Rules 4 and 5 support his position, but neither does. Habeas Rule 4 mandates that courts summarily dismiss facially meritless habeas petitions upon preliminary examination.[2] The Advisory Committee Note to the Rule sets forth its purpose: "it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." If the court concludes that it cannot dispose of the case based on the

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[2] Current Habeas Rule 4 provides, in relevant part: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed period of time, or to take other action the judge may order." Former Rule 4, before December 1, 2004, stated in relevant part, "The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise, the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate." Because former Rule 4 was in place when this case was before the district court, all references to Rule 4 will be to its former version unless otherwise indicated.

face of the petition and its exhibits, "the judge shall order the respondent to file an answer or other pleading . . . or to take such other action as the judge deems appropriate." In other words, once the petition has cleared the initial screening, the case will proceed ahead and the battle will be joined.

Petitioner asks this Court to draw the following negative inference from Habeas Rule 4: because the rule authorizes judges to dismiss petitions on their own motion *prior to* requiring an answer, but does not speak to the power of judges to dismiss petitions on their own motion *after* requiring an answer, this means judges lack the power to do so. Pet. Br. 28-30. Rule 4 cannot bear that weight. The existence of a screening procedure to weed out facially meritless petitions hardly suggests—let alone compels—that the rule be read to preclude judges from exercising their preexisting right to dismiss habeas actions *sua sponte*. A rule titled "Preliminary Consideration by Judge" does not dictate a judge's postliminary consideration. While Rule 4 does not expressly authorize post-answer *sua sponte* dismissals, neither does it expressly—or impliedly—prohibit them.[3]

Nor does Habeas Rule 5 detract from courts' inherent power to dismiss habeas actions based on affirmative defenses not raised by the State. Rule 5 has long stated that the State's answer "shall

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[3] One of Petitioner's amici has argued that a district court lacks the power to dismiss a petition under the Rule 4 screening procedure based on untimeliness. NACDL Br. 8-12. It is not clear how that argument bears on the questions presented. It suffices for now to observe that numerous courts of appeals have affirmed Rule 4 dismissals based on just that ground. *See Hill v. Braxton*, 277 F.3d 701, 705-06 (CA4 2002); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (CA11 2002) (*per curiam*); *Herbst v. Cook*, 260 F.3d 1039, 1041 (CA9 2001); *Acosta v. Artuz*, 221 F.3d 117, 124 (CA2 2000); *Kiser v. Johnson*, 163 F.3d 326, 329 (CA5 1999).

state whether the petitioner has exhausted his state court remedies." In light of *Granberry*, it is impossible to read such a command to the State as somehow eliminating the courts' authority to dismiss *sua sponte* based on non-exhaustion. It is likewise impossible to read new Rule 5(b), which states that the answer "must state whether any claim in the petition is barred by . . . a statute of limitations" as having that effect. Once again, the cited rule might bear on the issue of waiver (the first Question Presented by Petitioner); it does not resolve the issue of courts' *sua sponte* power (the second Question Presented).

* * * * *

This Court does "not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (internal citations and quotation marks omitted). Nothing in the Civil or Habeas Rules indicates any such intent with respect to the inherent power at issue in this case.

III. The Special Characteristics of Habeas Corpus Cases Justify this Court's Decision to Give Habeas Courts Broad Discretion to Invoke Their *Sua Sponte* Powers.

Petitioner asks the Court to treat habeas cases like any other civil case. Pet. Br. 15-19. But as this Court noted in *Harris v. Nelson*, 394 U.S. 286, 293-94 (1968), habeas is different. "It is, of course, true that habeas corpus proceedings are characterized as 'civil.' . . . But the label is gross and inexact. . . . Essentially, the proceeding is unique." *Id.* This uniqueness explains why the *Granberry* Court approved the practice of federal courts rejecting a habeas petition based on an affirmative defense not raised by the

State—even though that appears contrary to the practice in ordinary civil litigation.

Habeas cases involve broad societal interests. First and foremost, habeas cases are different because they involve interests beyond those of the immediate parties. *See United States v. Bendolph,* 409 F.3d. 155, 161-62 (CA3 2005) (en banc). While a habeas corpus proceeding is technically a civil suit seeking a release from custody, it is in essence another layer of appeal of a criminal conviction. Thus, the core interests at stake are the same as in any criminal proceeding—chiefly, society's need to maintain and establish order. These interests do not exist, at least not to the extent present in the criminal context, in any other civil context.

Relatedly, the Court has stated repeatedly in recent years that AEDPA's purpose is to further the interests of comity, finality, and federalism. *See Mayle v. Felix*, 125 S. Ct. 2562, 2573-74 (2005); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan*, 533 U.S. Ct. at 178; *Williams*, 529 U.S. Ct. at 436 (2000). AEDPA builds upon the Court's longstanding recognition that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempt to honor constitutional rights." *Engle*, 456 U.S. at 128. Further, "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused." *Id.* at 127. These sorts of concerns are rarely present in other civil actions.

For these reasons, the courts of appeals have long held (even before AEDPA) that "[t]he failure to respond to claims raised in a petition for habeas corpus does not entitle the petitioner to a default

judgment."[4] The proper disposition of a habeas case is too important to be forfeited by the State's failure to respond to a petition. Few other types of civil litigation cannot be disposed of through default judgment.

Connected with the broad societal interest in habeas cases, the State does not possess a "win at all costs" interest emblematic of most adversarial parties in civil litigation. In criminal cases, the State's ultimate interests are the ends of justice. The State certainly has an interest in protecting its convictions and its laws and processes, but it does not have an interest in the continued incarceration of the innocent or in protecting unlawful practices. States can and do concede error when mistakes have been made. *See, e.g., Saldano v. Texas*, 530 U.S. 1212 (2000) (granting certiorari, vacating judgment below, and "remand[ing] for further consideration in light of the confession of error by the Solicitor General of Texas").

Finally, the federal courts have special interests at play in habeas cases, particularly given the massive numbers of habeas cases filed each year. According to the Administrative Office of the United States Courts, about 24,000 to 25,000 habeas cases have been filed each year between 2000 and 2004.[5] Habeas cases

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[4] *Gordon v. Duran*, 895 F.2d 610, 612 (CA9 1990) (citing *Bermudez v. Reid*, 733 F.2d 18, 21 (CA2 1984); *Broussard v. Lippman*, 643 F.2d 1131, 1134 (CA5 1981); *Goodman v. Keohane*, 663 F.2d 1044, 1047 n.4 (CA11 1981); *Allen v. Perini*, 424 F.2d 134, 138 (CA6 1970)); *see also* 28 U.S.C. § 2254(d) (identifying the showing that petitioner must make under AEDPA before a court is authorized to grant relief).

[5] *See* The Administrative Office of the United States Court, *Judicial Business of the United States Courts 2004*, at Table C-2, U.S. District Courts–Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-month Period Ending Sept. 30, 2004, available at

constitute the largest single identifiable source of new civil cases by far. Giving federal courts greater discretion to dismiss time-barred cases frees up precious judicial resources to deal with the many other cases—habeas or otherwise—on their docket. Thus, for example, a court may decide that, rather than writing a fifty-page opinion rejecting a petitioner's myriad claims on the merits, it is more efficient to dismiss the petition through a three-page opinion addressing the limitations period. This gives the court time to address more fully other cases that truly warrant an extended merits review. *See Granberry,* 481 U.S. at 135 (noting that when a State inadvertently fails to raise an affirmative defense, courts have a duty to see whether interests in judicial efficiency are better served by dismissal).

Taken together, the broader societal interests present in habeas cases strongly militate in favor of giving courts increased discretion to dismiss habeas petitions. An error by the State in failing to raise an affirmative defense in its responsive pleading is not without consequence; but the many other societal interests at stake should not be forfeited on account of the State's error. District courts should be given the discretion to take into account the interests in comity, federalism, and finality—and, where appropriate, dismiss a habeas action based on an affirmative defense not raised by the State.

Habeas procedure differs from ordinary civil procedure. The practice of habeas cases is also notably distinct from ordinary civil practice. This is a function of both the hybrid nature of the proceedings and their overwhelming number. A habeas case begins when a prisoner in state custody sues the warden claiming he is

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http://www.uscourts.gov/judbus2004/contents.html (last visited December 29, 2005).

being held unlawfully. The remedy is not money, as in most civil cases, but freedom from custody. Not only is the form of relief unique, but in determining the lawfulness of a prisoner's custody the federal courts review state court criminal judgments to determine whether the State infringed upon a defendant's federal constitutional rights. As noted earlier, this review of a state court's judgments is more akin to an appeal than an original action. Indeed, habeas corpus cases are an exception to the general rule that lower federal courts are not empowered to review state court decisions. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1526 (2005) (describing *Rooker-Feldman* doctrine as depriving district courts of jurisdiction over cases where the "losing party in state court file[s] suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment").

Cognizant of the inherent differences between habeas litigation and other civil litigation, the framers of the Habeas Rules made clear that the Civil Rules do not automatically apply in habeas cases. Habeas Rule 11 provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." As such, the federal courts may apply the Civil Rules where appropriate and beneficial, but they are not bound by them. *See Gonzales v. Crosby*, 125 S. Ct. 2641, 2646 (2005) ("Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules."); *Woodford*, 538 U.S. Ct. at 208 (same). This Court has never read Civil Rule 81(a)(2)—which itself provides that the Civil Rules do not always apply in habeas cases—as undoing Habeas Rule 11's limitation on the Civil Rules' applicability.

Habeas Rule 11, in conjunction with the other Habeas Rules, has resulted in there being numerous unique (or at least unusual) aspects to habeas practice. Many of these differences strongly militate in favor of courts having the authority to dismiss petitions *sua sponte* based on defenses not timely raised by the State.

1. Several aspects of habeas practice lessen the costs of allowing *sua sponte* dismissals. Petitioner expresses the concern that *sua sponte* dismissals will result in wasted resources. Pet. Br. 37-38. But two aspects of habeas practice significantly reduce the likelihood that great amounts of time and effort will have been expended prior to a *sua sponte* dismissal. First, absent from most habeas cases is the common civil practice of discovery. Habeas Rule 6 allows discovery only by leave of court. This stems from the recognition that in most cases a complete record was developed during the prior state court proceedings. Mandatory discovery would wrongly allow federal habeas courts to transplant state courts as the primary forum for litigating state criminal cases.

Second, few habeas courts hold hearings at which new evidence may be introduced. AEDPA set tight strictures on when federal evidentiary hearings can be granted. *See* 28 U.S.C. § 2254(e)(2); *Bradshaw v. Richey*, 126 S. Ct. 602, 605 (2005) (criticizing court of appeals for failing to determine whether the petitioner satisfied the multiple threshold requirements before a federal evidentiary hearing may be held).[6]

The result is that habeas cases are essentially appellate in nature, involving review of a (usually complete) state court record.

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[6] Oral arguments are also a rare practice in the world of habeas cases. No rule or statute addresses this practice, and so most courts hold them only when they are beneficial to the court such as with a new issue of law.

The vast majority of habeas cases are disposed of on the pleadings and briefs. As a consequence, whereas an ordinary civil defendant's failure to assert an affirmative defense will typically lead to protracted discovery and possibly a jury trial, a State's failure to do so in a habeas case rarely results in the former and never in the latter. The purported costs of *sua sponte* dismissals based on waived defenses—the time and resources devoted by the parties and the court in litigating a claim that should have been dismissed earlier—are, therefore, far less in habeas cases.

Here, for example, although Petitioner emphasizes the time that elapsed between the State's answer and the court's invoking the statute of limitations (Br. 37-38), he has never shown that anything happened in that time period that prejudiced him in any way. In most habeas cases, after the pleadings are submitted the parties simply await the ruling of the federal court and expend no additional resources. *See, e.g., Long v. Wilson*, 393 F.3d 390, 399 (CA3 2004) (noting delay of 14 months not attributable to State and that it was reasonable for parties to await action of judge after pleadings filed).

2. Habeas practice imposes a unique burden on States. The enormous volume of habeas cases places a severe strain on State resources. Exacerbating the strain is the fact that habeas petitioners are overwhelmingly *pro se*. *Pro se* petitions are often handwritten and difficult to read, if not also long and substantively incomprehensible. In fact, it may sometimes be the case that when a State mistakenly fails to raise an available defense, that failure results from the difficulty in discerning the actual factual, procedural, and legal assertions the *pro se* petitioner is making. Habeas corpus rules and practice attempt to ameliorate the situation in a variety of ways.

First, as discussed earlier, Habeas Rule 4 requires habeas courts to review petitions and summarily dismiss them if they "plainly" do not merit relief. The rule's purpose, as also discussed earlier, is to "eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee Note to Habeas Rule 4.

Second, many courts that order responses allow the State to proceed with piecemeal litigation, *e.g.*, raise jurisdictional and affirmative defenses in initial responses and answer on the merits only if the litigation continues. This practice of piecemeal litigation illustrates the difference between habeas cases and other civil actions, for Civil Rules 8(c) and 12(b) provide that a party must normally raise all defenses in the first pleading. But many habeas courts understand the burden that strict application of Rules 8(c) and 12(b) would place upon a State, especially when the overwhelming majority of suits are meritless.

Third, whereas Civil Rule 12(a) requires an answer to be served within 20 days after service of the summons and complaint, habeas courts are often more flexible in setting a date by which the State must answer. In Texas alone, these answer deadlines vary from as little as 20 days to as long as six months. Again, this added flexibility is designed to ease the States' burden in responding to the multitude of habeas petitions.

Allowing habeas courts to dismiss petitions *sua sponte* based on affirmative defenses not raised by the State is consistent with these rules' and practices' recognition of the practical challenges States face in habeas actions. The holding in *Granberry* can be fairly understood as an acknowledgment of this situation and of the unique nature of habeas practice in general.

IV. The Federal Courts Can Apply, and Have Applied, Their *Sua Sponte* Power With Appropriate Discretion.

Petitioner claims that if the Court allows lower federal courts broad *sua sponte* power, those courts will be overcome with temptation and abuse it. Pet. Br. 39. Petitioner has presented no evidence, however, that district courts have abused their widely-recognized *sua sponte* power to dismiss cases based on the affirmative defenses of non-exhaustion and procedural default. And even if a court were overly aggressive in invoking unraised affirmative defenses, habeas petitioners would not be without a remedy. Federal district courts are always under the supervision of their circuit courts, which in turn are subject to correction in this Court. *Cf. Rhines v. Weber*, 125 S. Ct. 1528, 1535 (2005) (recognizing that "stay and abeyance should be available only in limited circumstances," but still giving district courts the discretion to employ the procedure). As this Court stated in *Link*, 370 U.S. at 633, concerns arising from *sua sponte* dismissals are best addressed not by curtailing inherent powers, but rather by determining whether a court has acted "within the permissible range of the court's discretion." Such factors as prejudice to the petitioner, the State's good faith, the time elapsed, and even the merits of the petition are appropriate considerations in judging the court's exercise of discretion.

With respect to the State's good faith, a brief response to Petitioner's "sandbagging" argument (Br. 14, 38) is in order. Affirmative defenses quite naturally benefit the State. These defenses not only protect the larger interests in comity and finality but also reduce the demands on State resources. Once a State has undertaken the effort necessary to answer the merits of a petition, the greatest amount of resources will usually have been expended. Very little, if any, benefit could possibly inure to the State in expending such resources and then belatedly asserting (or hoping

the court will *sua sponte* rule on) a defense. It is the rarest of cases in which a State would have any motivation to overlook and likely forfeit a "sure win" only to litigate the case on the merits. And there is no reason to believe district courts would be unable to discern when that occurs.

In the end, there is no reason to doubt that the district courts will, in the main, wisely exercise their discretion to dismiss habeas petitions *sua sponte*. In doing so, they will advance society's interests in finality, society's concomitant comity and federalism interests, and the courts' own case management interests.

CONCLUSION

This Court should affirm the lower court's judgment.

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